Supreme Court, U.S.
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91-1932

Case No. _____

UNITED STATES SUPREME COURT

1992 Term

IRVIN H. WHITEHOUSE & SONS COMPANY, INC. **Petitioner**

v.

LOCAL UNION 118 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, et al.

Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LAURENCE J. ZIELKE
PEDLEY ROSS ZIELKE GORDINIER
1150 Starks Building
Louisville, Kentucky 40202
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114

QUESTIONS PRESENTED FOR REVIEW

1. ARE THE MANDATORY PROVISIONS OF THE UNITED STATES ARBITRATION ACT (9 U.S.C. § 1) REQUIRING FEDERAL COURTS TO CERTIFY ARBITRATION AWARDS SUBSERVIENT TO THE NATIONAL LABOR RELATIONS BOARD.

2. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT REFUSED TO CERTIFY AN ARBITRATION AWARD OBTAINED PURSUANT TO AN ARBITRATION CLAUSE OF A COLLECTIVE BARGAINING AGREEMENT, AS MANDATED BY THE UNITED STATES ARBITRATION ACT (9 U.S.C. § 1, et seq.).

3. DOES THE NATIONAL LABOR RELATIONS BOARD HAVE STANDING TO INTERVENE IN PROCEEDINGS IN FEDERAL COURT INITIATED UNDER THE UNITED STATES ARBITRATION ACT (9 U.S.C. § 1).

PARTIES

Petitioners:

IRVIN H. WHITEHOUSE & SONS COMPANY
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LOUISVILLE, KENTUCKY 40218

IRVIN H. WHITEHOUSE & SONS
PULP & PAPER DIVISION COMPANY, INC.
4600 JENNINGS LANE
P.O. BOX 32670
LOUISVILLE, KENTUCKY 40218

IRVIN H. WHITEHOUSE & SONS
COMPANY OF VIRGINIA
4600 JENNINGS LANE
P.O. BOX 32670
LOUISVILLE, KENTUCKY 40218

PROFESSIONAL APPLICATORS AND
MAINTENANCE COMPANY
4600 JENNINGS LANE
P.O. BOX 32670
LOUISVILLE, KENTUCKY 40218

Respondents:

LOCAL UNION 118
INTERNATIONAL BROTHERHOOD OF PAINTERS AND
ALLIED TRADES, AFL-CIO
1930 BISHOP LANE, SUITE 417
WATTERSON TOWERS
LOUISVILLE, KENTUCKY 40218

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS,
LOCAL 89
3813 TAYLOR BOULEVARD
LOUISVILLE, KENTUCKY 40213

NATIONAL LABOR RELATIONS BOARD
REGION 9
550 MAIN STREET
SUITE 3003, JOHN WELD PECK
FEDERAL BUILDING
CINCINNATI, OHIO 45202

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . i

PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

I. REPORTS AND OPINIONS OF OTHER COURTS AND ADMINISTRATIVE AGENCIES . 1

II. JURISDICTION 7

III. APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS 7

IV. STATEMENT OF CASE 9

V. BASIS FOR ALLOWANCE OF WRIT 14

A. The District Court Abused Its Discretion As Limited By The Arbitration Act 14

B. The District Court Erroneously Concluded It Lacked Subject-Matter Jurisdiction 19

SUMMARY 24

JUDGMENT, Entered 4/9/90. . . . . App. A

MEMORANDUM OF TELEPHONIC PRETRIAL CONFERENCE AND ORDER, Entered 5/10/90. . . . . App. B

ORDER, Entered 8/14/90. . . . . App. C

ORDER, Entered 8/14/90. . . . . App. D

DECISION AND ORDER, Dated 10/19/90. . . . . App. E

MEMORANDUM OPINION, Entered 1/29/91 . . . . . App. F

ORDER, Entered 1/29/91. . . . . App. G

JUDGMENT, Entered 2/5/92 Entered as MANDATE 2/28/92. . . . App. H

RELEVANT STATUTES . . . . . App. I

American Arbitration Act, 9 U.S.C. § 1. 1

9 U.S.C. § 2 2

9 U.S.C. § 9 2

9 U.S.C. § 10. 3

9 U.S.C. § 11. 5

9 U.S.C. § 13. 6

National Labor Relations Act, 29 U.S.C. § 151, et seq. 7

29 U.S.C. § 159. 9

TABLE OF AUTHORITIES

Cases Cited:

Alexander v. Gardner-Denver Company, 415 U.S. 36, 94 S.Ct. 1011 (1974) 21

Anaconda Co. v. District Lodge No. 27 of Int'l Association of Machinists and Aerospace Workers, 693 F.2d 35, 38 (6th Cir. 1982) 19

Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 S.Ct. 401 (1964) 22

Grand Bahama Petroleum Co., Ltd. v. Asiatic Petroleum Corp., 550 F.2d 1320 (5th Cir. 1977) 15

Moses H. Cone Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 744 L.Ed.2d 765 (1983) 23

Perry v. Thomas, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) 15

Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1963) 22

Southland Corporation v. Keating, 465 U.S. 1, 104 S.Ct. 852, 858-860, 79 L.Ed.2d 1 (1984) 14

United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987) 18

United Steelworkers of America v. Warrior & Gulf Navigation Company, 80 S.Ct. 1347, 363 U.S. 574, 4 L.Ed.2d 1409 (1960). . . 15, 18

Statutes Cited:

9 U.S.C. § 1 9

9 U.S.C. § 2 16

9 U.S.C. § 9 . . . . . 13, 16, 17

9 U.S.C. § 10 . . . . . 13, 17, 18

9 U.S.C. §6 16

28 U.S.C. § 1291 13

28 U.S.C. § 1254(1) 7

29 U.S.C. § 151 9

29 U.S.C. § 158 20

29 U.S.C. § 160(e) 13

I.

REPORTS AND OPINIONS OF OTHER COURTS AND ADMINISTRATIVE AGENCIES

1. Judgment of the United States District Court for the Western District of Kentucky in the matter of Irvin H. Whitehouse & Sons Co., Inc. v. Local Union No. 118 of The International Brotherhood of Painters and Allied Trades, AFL-CIO, et al., Civil Action No. 90-0143-L-J, entered April 9, 1990

2. Memorandum of Telephonic Pretrial Conference and Order in the matter of Irvin H. Whitehouse & Sons Company v. Local Union 118 of the International Brotherhood of Painters and Allied Trades, AFL-CIO and General Drivers, Warehousemen and Helpers, Local Union No. 89,

Civil Action No. 90-0143 L(J), entered May 10, 1990

3. Order of the United States District Court for The Western District of Kentucky at Louisville vacating April 4, 1990 Order and establishing pretrial conference the matter of Irvin H. Whitehouse & Sons Company, Inc. v. Local Union 118 of the International Brotherhood of Painters and Allied Trades General Drivers, Civil Action No. 90-0143 L(J), entered August 14, 1990.

4. Order of the United States District Court, Western District of Kentucky at Louisville, reinstating action to active docket, in the matter of Irvin H. Whitehouse & Sons Company, Inc. v. Local Union 118 of the

International Brotherhood of Painters and Allied Trades, AFL-CIO, et al., Civil Action No. 90-0143-L(J), entered August 14, 1990

5. Decision and Order of the National Labor Relations Board in the matter of Irvin H. Whitehouse & Sons Company, Inc. and General Drivers, Warehousemen and Helpers Local Union #89, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Case No. 9-CA-27701, entered October 19, 1990

6. Memorandum Opinion of the United States District Court, Western District of Kentucky, Louisville Division, in the matter of Irvin H.

Whitehouse & Sons Company, Inc. v. Local Union 118 of the International Brotherhood of Painters, etc., v. General Drivers, Warehousemen & Helpers, Local Union No. 89, etc., Civil Action No. C90-0413-L(J), entered January 29, 1991

7. Order of the United States District Court, Western District of Kentucky, Louisville Division, granting motions of the NLRB to intervene and to dismiss the action with prejudice, in the matter of Irvin H. Whitehouse & Sons Company, Inc. v. Local Union 118 of the International Brotherhood of Painters, etc. v. General Drivers, Warehousemen & Helpers, Local Union No. 89, etc., Civil Action No. C90-0143-L(J), entered January 29, 1991

8. Judgment and Mandate of the United States Court of Appeals for the Sixth Circuit, on appeal from the United States District Court for the Western District of Kentucky in the matter of Irvin H. Whitehouse & Sons Company, Inc. v. Local Union No. 118 of the International Brotherhood of Painters and Allied Trades, AFL-CIO and General Drivers, Warehousemen and Helpers, Local Union No. 89; National Labor Relations Board, No. 91-5307 and on application for enforcement of an Order of the National Labor Relations Board in the matter of National Labor Relations Board v. Irvin H.

Whitehouse & Sons Company, Inc., No. 91-5867, entered as Judgment on February 5, 1992; issued as Mandate on February 28, 1992

II.

JURISDICTION

A final and appealable decree was entered by the United States Court of Appeals for the Sixth Circuit on February 5, 1992.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

III.

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS.

The following statutes are relevant to this matter:

1. United States Arbitration Act, 9 U.S.C. §§ 1, 2, 9, 10, 11 and 13 set forth in pertinent part in the Appendix hereto.

2. National Labor Relations Act, 29 U.S.C. § 158(a), set forth in the Appendix hereto.

3. National Labor Relations Act, 29 U.S.C. § 159, set forth in the Appendix hereto.

IV.

STATEMENT OF CASE

This case presents a direct conflict between the purposes and objectives of, and the public policy established by Congress through the United States Arbitration Act ("the Act")(9 U.S.C. § 1, et seq.), and judicial determinations as to the scope of the National Labor Relations Act (29 U.S.C. § 151, et. seq.) and the jurisdictions of the National Labor Relations Board ("NLRB").

Employees classified as painters, apprentices and utility workers of Irvin H. Whitehouse & Sons Company, Inc. ("Whitehouse") have been represented for more than 40 years by Local Union No. 118 of the International Brotherhood of Painters and Allied Trades, AFL-CIO ("Local 118") under a multi-employer collective bargaining agreement. The

collective bargaining agreement describes the work jurisdictions granted to Local 118 and contains a mandatory arbitration clause. The labor contract recognized three classifications of work, including work performed by "utility workers."

Local 118 filed a grievance against Whitehouse under the collective bargaining agreement alleging that Whitehouse breached the contract for failure to require utility workers in Whitehouse's paint shop to join, or otherwise pay dues to, Local 118 as required by union security provisions of the collective bargaining agreement. The matter was submitted to the arbitration panel as required by the collective bargaining agreement to determine if work performed by paint shop utility workers was within the scope of Local 118's jurisdiction. Concurrently, the General

Drivers, Warehousemen and Helpers, Local Union No. 89 ("Local 89") was engaged in proceedings to obtain authority to represent Whitehouse's paint shop utility workers.

The arbitration panel found that the work in question was work to which Local 118 was entitled under the terms of the collective bargaining agreement. The panel held that Whitehouse violated the collective bargaining agreement by allowing non-members of Local 118 to perform work. Whitehouse was directed to require the paint shop utility workers to join Local 118 or otherwise pay dues to Local 118 as required by the collective bargaining agreement.

Whitehouse invoked the Act in the United States District Court for the Western District of Kentucky, seeking certification of the arbitration award.

Local 118 agreed to a judgment certifying the award and the District Court entered an Order certifying the award on April 9, 1990 (Appendix A).

On the date the arbitration panel issued its decision, the NLRB conducted a hearing on allegations by Local 89 that Local 89 should be designated as the bargaining agent for Whitehouse's paint shop utility workers. On October 19, 1990, the NLRB issued an Order sustaining Local 89's position and directed Whitehouse to bargain with Local 89 as the agent for the paint shop utility workers. (Appendix E).

Upon motion, the United States District Court granted Local 89 and the NLRB, individually, permission to intervene in the Arbitration Act proceedings. (Appendices B, G). Subsequently, contrary to the black

letter law stated in the Arbitration Act at 9 U.S.C. §§ 9 and 10, the District Court vacated its certification order and dismissed the action asserting that the matter before it was not contractual but was a "representational issue" over which the District Court lacked jurisdiction. (Appendix F, p. 6; Appendix G).

Whitehouse appealed the final decision of the District Court to the Sixth Circuit pursuant to 28 U.S.C. § 1291. The National Labor Relations Board initiated action in the United States Court of Appeals for the Sixth Circuit for enforcement of its order pursuant to 29 U.S.C. § 160(e). The cases on appeal were consolidated for hearing and disposition. The decision of the District Court and of the NLRB were sustained.

Whitehouse seeks a writ of certiorari from the decision of the Court of Appeals on the grounds that (1) the issues present questions which have not, but should be, addressed by this Court; (2) the ruling of the Court of Appeals conflicts with prior rulings of this Court; and (3) the Court of Appeals' decision condones abuse of discretion of the District Court.

V.

BASIS FOR ALLOWANCE OF WRIT

A. The District Court Abused Its Discretion As Limited By The Arbitration Act.

The Arbitration Act reflects congressional establishment of a national policy favoring arbitration to resolve contract disputes. Southland Corporation v. Keating, 465 U.S. 1, 104 S.Ct. 852, 858-860, 79 L.Ed.2d 1 (1984). The purpose

of the Arbitration Act is to require arbitration where the parties to the contract have agreed to arbitrate disputes related to the contract. Perry v. Thomas, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). The objective of the Arbitration Act is to establish an entire body of substantive law applicable to all arbitration agreements. Grand Bahama Petroleum Co., Ltd. v. Asiatic Petroleum Corp., 550 F.2d 1320 (5th Cir. 1977). This includes arbitration clauses in collective bargaining agreements. United Steelworkers of America v. Warrior & Gulf Navigation Company, 80 S.Ct. 1347, 363 U.S. 574, 4 L.Ed.2d 1409 (1960).

Congress declared as "irrevocable" the right to resolve and dispose by arbitration a controversy involving a contract containing a mandatory arbitration clause, except "on such

grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Congress mandated that federal courts must certify arbitration awards upon request of any party. 9 U.S.C. §§ 6 and 9. A court ruling which denies the parties to arbitration court certification provided for by the Arbitration Act on grounds other than the limited basis prescribed by Congress emasculates the Act, and defies the congressional objectives. The District Court had limited discretion to deny the application for certification: "The court must grant such an order [certifying an arbitration award] unless the award is vacated, modified or corrected as prescribed [only] in sections 10 and 11 of this Title." 9 U.S.C. § 9 (emphasis added). The only alternative to certification of

arbitration awards provided by the Act is to vacate or alter the arbitration award. The District Court had no authority to deny certification of the award.

The District Court's discretion is first limited as to whom may appear in regard to a proceeding under the Act. Congress provided that "any party to the arbitration" may be heard to object to certification of the arbitration award (9 U.S.C. §§ 10 and 11 (emphasis added). Neither the NLRB nor Local 89 were "parties" to the arbitration proceeding. They were specifically excluded by Congress from intervening in the District Court proceedings. The District Court abused its discretion by permitting the NLRB and Local 89 to intervene to object to certification of the arbitration award.

Second, the District Court's authority to vacate or modify the arbitration award only arises if there is evidence of corruption, fraud or misconduct of the parties involved in the arbitral process or upon computational errors, errors of procedure or scope of arbitration. 9 U.S.C. §§ 10 and 11. There was no evidence nor assertion of corruption, fraud or misconduct by either Whitehouse or Local 118. Work jurisdiction issues are arbitrable. United Steelworkers v. Warrior & Gulf, supra. Although the District Court did not vacate or amend the arbitration award, its refusal to certify the award rendered the award a nullity in defiance of the Act.

Third, Congress specifically restricted the scope of review allowed to courts of arbitration awards. United

Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). This rule obtains even when the award is based on errors of fact as well as of federal law. Anaconda Co. v. District Lodge No. 27 of Int'l Association of Machinists and Aerospace Workers, 693 F.2d 35, 38 (6th Cir. 1982). The District Court abused its discretion by looking beyond the four corners of the collective bargaining agreement to find a basis to deny certification of the award.

B. The District Court Erroneously Concluded It Lacked Subject-Matter Jurisdiction.

At all times relevant hereto, Local 118 was the sole bargaining agent authorized to represent any of Whitehouse's employees. It was not until approximately six (6) months after Local

118 filed its grievance against Whitehouse that Local 89 was certified by the NLRB as the bargaining agent for the subject paint shop utility workers at Whitehouse. The NLRB termed the issue before the arbitration panel convened under Whitehouse's contract with Local 118 as a representational issue as opposed to the work jurisdictional issue, citing to Section 301 of the Labor-Management Relations Act (29 U.S.C. § 158).

The action initiated by Whitehouse for certification of the arbitration award was not a representational proceeding nor did it entail a representational issue. The simple issue which was arbitrated was whether or not Whitehouse's paint shop utility workers were performing work within the contractual jurisdiction of Local 118 and

whether Whitehouse was permitting employees to perform work within the jurisdiction of Local 118 without requiring contribution to Local 118. Local 89 was not certified to represent any Whitehouse employee. Thus, there was no dispute among unions as to which union was then entitled to the work being performed by Whitehouse's paint shop utility workers.

Assuming, arguendo, that a "representational issue" could be deemed to exist, such did not deprive the District Court of jurisdiction to certify the arbitration award. In Alexander v. Gardner-Denver Company, 415 U.S. 36, 94 S.Ct. 1011 (1974), this Court held that the right to arbitrate, and the consequent right to certification under the Arbitration Act, are unaffected by possible concurrent application of other

federal law. Id. 415, U.S. at 52, 94 S.Ct. at 1022. Thus, in Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1963), this Court held that the possibility of conflict between the result of an arbitration proceeding and certification and a determination by the NLRB creates no legitimate barrier to the contractual parties obtaining benefit of the arbitration proceeding for which they contracted. Id. 371 U.S. at 191, 83 S.Ct. at 270. Similarly, in Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 84 S.Ct. 401 (1964), this Court held that even if an issue could be couched as a representative matter, arbitration may have a persuasive and curative effect even though one union is not a party. Id, 375 U.S. at 272, 84 S.Ct. at 409. In the instant case,

certification of the arbitration award would have the desired curative effect. Most recently, in Moses H. Cone Hospital v. Mercury Construction Corporation, 460 U.S. 1, 103 S.Ct. 927, 744 L.Ed.2d 765 (1983), this Court concluded that, as a matter of federal law, all doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Id., 460 U.S. at 25, 103 S.Ct. at 941. The District Court's rejection of jurisdiction with the concurrence of the Court of Appeals is contrary to the extensive history of law developed by this Court. The Court is urged to issue a Writ of Certiorari, to entertain this case on its docket, and to issue its opinion putting to rest the relationship of the Arbitration Act and the National Labor Relations Act.

SUMMARY

The District Court abused its discretion by permitting non-parties to the arbitration to intervene, by refusing to certify the arbitration award, and by denying certification on questions outside of the statutory scope of review granted federal courts under the Arbitration Act.

The District Court's determination that it lacked jurisdiction to certify the arbitration award is inconsistent with established law.

WHEREFORE, for the foregoing reasons, Irvin H. Whitehouse & Sons Company, Inc. respectfully petitions the United States Supreme Court for a Writ of Certiorari.

Respectfully submitted

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(502) 589-4600
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IRVIN H. WHITEHOUSE & SONS COMPANY, INC.,	)	
Plaintiff,	)	Civil Action No. C-90-0143-L-J
v.	)	
LOCAL UNION 118 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO,	)	
Defendant.	)	

JUDGMENT

Complaint having been filed, and the Court being sufficiently advised of the terms of the Articles of Agreement between Contracting Painting and Decorators of Louisville and Vicinity and Painters Local Union No. 118; and,

The Court having been advised that Local Union 118, having filed a grievance concerning the Shop employees employed by Plaintiff, Irvin H. Whitehouse & Sons

Company, Inc., alleging that the Shop employees should be members of Local Union 118; and

The Court having been advised of the Grievance and Arbitration Procedure, Article XV of the Collective Bargaining Agreement and having read the findings of the Joint Trade Board for the Paint Industry, dated February 6, 1990;

NOW, THEREFORE, BE IT ADJUDGED that the Decision of the Joint Trade Board for the Paint Industry decided and entered February 6, 1990, is confirmed in its entirety and is final and binding on Plaintiff and Defendant, and that the Shop employees of Irvin H. Whitehouse & Sons Company, Inc., shall become members of Local Union 118 in accordance with the terms of the Collective Bargaining Agreement.

THIS IS A FINAL AND APPEALABLE ORDER.

EDWARD H. JOHNSTONE
Judge, United States District Court, Western District of Kentucky

DATED: 4/6/90
ENTERED: April 09, 1990

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 90-0143 L(J)

IRVIN H. WHITEHOUSE & SONS COMPANY

vs.

LOCAL UNION 118 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89

MEMORANDUM OF TELEPHONIC PRETRIAL CONFERENCE AND ORDER

A telephonic pretrial conference was held on May 7, 1990.

APPEARANCES:

For the Plaintiff: Mr. Lawrence J. Zielke

For the Defendants: Mr. Ralph H. Logan
Mr. Thomas J. Schultz

IT IS ORDERED:

1. The motion of General Drivers, Warehousemen and Helpers, Local Union No. 89 to intervene herein as a party-defendant is GRANTED.

2. The effective date of the Judgment entered April 9, 1990 is STAYED

pending further consideration of the motion to set aside judgment.

This 8th day of May, 1990

EDWARD H. JOHNSTONE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED MAY 10, 1990

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 90-0143 L(J)

IRVIN H. WHITEHOUSE &
SONS COMPANY, INC.

vs.

LOCAL UNION 118 OF THE INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED
TRADES GENERAL DRIVERS

O R D E R

The Court having considered the above matter,

IT IS ORDERED:

1. The Order of this Court entered April 4, 1990 is VACATED.

2. A pretrial conference will be held September 13, 1990 at 4 P.M.

This 14th day of August, 1990

EDWARD H. JOHNSTONE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED 8/14/90

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IRVIN H. WHITEHOUSE & SONS COMPANY, INC.

v. CIVIL ACTION NO. 90-0143-L(J)

LOCAL UNION 118 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, ET AL.

ORDER

This Court having reviewed the above-styled action,

IT IS HEREBY ORDERED that this action shall be **REINSTATED** on the active docket of the Court.

Dated: August 14, 1990

ENTERED BY ORDER OF THE COURT:
EDWARD H. JOHNSTONE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

By: Deputy Clerk

ENTERED AUGUST 14, 1990

APPENDIX E

SDO

300 NLRB NO. 12

D--1515
Louisville, KY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

IRVIN H. WHITEHOUSE & SONS COMPANY, INC.

and

Case 9--CA--27701

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION #89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On August 17, 1990, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 9--RC--15627. (Official notice is taken of the "record" in the representation proceeding as

defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On September 10, 1990, the General Counsel filed a Motion for Summary Judgment. On September 13, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response on September 26, 1990.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. In its response to the Notice to Show Cause and as an affirmative defense in its answer the Respondent contends, as it did in the underlying representation proceeding, that the Board is without jurisdiction to certify the Union because the unit employees in question are currently represented by another union, Local Union 118, International Brotherhood of Painters and Allied Trades, AFL--CIO, to which it has granted recognition, and because it has a collective-bargaining agreement with Local Union 118 covering said unit of employees that has been upheld in an arbitration award and

confirmed by a U.S. district court. For these reasons, it contends that it would be legally impossible for the Respondent to bargain with the Union.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See Pittsburgh Plate Glass Co. v. NLRB, 313

U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent is a Kentucky corporation engaged in the application of commercial and industrial coatings and related services from its Louisville, Kentucky facility. During the 12 months preceding the issuance of the complaint the Respondent, in the course of conduct of its business, purchased and received at its Louisville, Kentucky facility products, goods, and materials valued in excess of $50,000 directly from points and places outside the State of Kentucky. We find that the Respondent is an

employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following a secret mail ballot election,[1] the Union was certified on June 1, 1990, as the collective-bargaining representatives of the employees in the following appropriate unit:

> All shop employees employed by Irvin H. Whitehouse & Sons Company, Inc. at its Louisville, Kentucky facility, including all truck drivers, warehousemen, mechanics,

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[1] The mail ballots were returnable by May 22, 1990, and were opened and counted on May 24, 1990.

> maintenance employees and receiving clerks, but excluding all painters, apprentices, field utility employees, office clerical employees, sales employees and all professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about July 5, 1990, the Union requested the Respondent to bargain, and since on or about that same date, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after July 5, 1990, to bargain with the Union as the

exclusive collective-bargaining representative of employees of the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial

period of the certification as beginning the date the Respondent begins to bargain in good faith wit the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964) enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Irvin H. Whitehouse & Sons Company, Inc., Louisville, Kentucky, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with General Drivers, Warehousemen and Helpers Local

Union #89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is

reached, embody the understanding in a signed agreement:

> All shop employees employed by Irvin H. Whitehouse & Sons Company, Inc. at its Louisville, Kentucky facility, including all truck drivers, warehousemen, mechanics, maintenance employees and receiving clerks, but excluding all painters, apprentices, field utility employees, office clerical employees, sales employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided

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[2] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. October 19, 1990

James M. Stephens, Chairman
Dennis M. Devaney, Member
Clifford R. Oviatt, Jr., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IRVIN H. WHITEHOUSE &
SONS COMPANY, INC.,
PLAINTIFF,

v. CIVIL ACTION
No. C90-0413-L(J)

LOCAL UNION 118 OF THE
INTERNATIONAL BROTHERHOOD
OF PAINTERS, etc.,
DEFENDANT.

v.

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION NO. 89, etc.,
INTERVENER

MEMORANDUM OPINION

This case involving a representational dispute between two rival unions is complicated by conflicting decisions from other tribunals as to which union is the appropriate representative. Before deciding the issue, it is important to understand the factual and procedural history of the case.

Plaintiff Irvin H. Whitehouse & Sons Company, Inc. is a commercial and industrial painting contractor who is a member of the Louisville Chapter of the Painting and Decorating Chapter of America (the Chapter). For nearly one half a century, Whitehouse has recognized the Defendant, Local Union 118 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (the Painters) as the official bargaining agent of its non-management employees. The recognition is memorialized in a Collective Bargaining Agreement between the Chapter and the Painters which establishes the scope of work within the jurisdiction of the Painters, and requires that disputes arising under the Agreement be presented to the Joint Trade Board for resolution. The Joint Trade Board is composed of

representatives from the Painters of the Chapter.

At the time the original collective bargaining agreement was negotiated, Whitehouse had only one paint shop employee. He was excluded from the Painters because he was too old to enter the appropriate program. As the number of employees in the paint shop increased, none paid union dues, voted for a representative, or participated with the Painters in any manner.

General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Teamsters), filed a Petition for Representation with the National Labor Relations Board (the NLRB) seeking to represent the nine paint shop employees.

After receiving notice of the Teamsters' petition, Whitehouse filed a petition with the NLRB seeking to determine whether these nine employees should be included in the existing bargaining unit of the Painters.

At the time the proceedings were pending before the NLRB, the Painters filed a grievance with the Joint Trade Board charging Whitehouse with breach of its Collective Bargaining Agreement for assigning work within the jurisdiction of the Painters to non-union employees. The Joint Trade Board found that the employees were members of the Painters and covered by the Collective Bargaining Agreement.

Whitehouse then filed this action against the Painters seeking enforcement of the decision of the Joint Trade Board pursuant to 9 U.S.C. 1, et seq., and 29

U.S.C. 185(a). The case was presented as a suit to enforce an arbitration award between the parties then before the court. The Painters admitted all allegations in their answer, and Judgment was entered. At the time judgment was entered, this court was not aware that other parties had an interest in this action, and neither the NLRB nor the Teamsters were aware of the proceedings. On the Teamsters' motion, the judgment was set aside and the Teamsters were permitted to intervene.

Ironically, on the day this court entered its judgment in this case, the NLRB found that the work performed by these employees was work ordinarily performed by the Teamsters and ordered an election. The Teamsters won the election and were certified by the NLRB as the bargaining agent for the nine employees.

The case is now before the court on motions of the NLRB to intervene and to dismiss the complaint for lack of jurisdiction. Because the NLRB has a protectable interest in this action which is not adequately represented by the existing parties, the motion to intervene is granted. Having analyzed the issues and applicable law, the NLRB's motion to dismiss this action is also granted.

It is not the task of this court to interpret the labor contract or decide the representational issues. The court need only decide whether it has jurisdiction to consider the action. A district court has jurisdiction to decide cases involving breaches of collective bargaining agreements. It does not have jurisdiction to decide the representational status of a bargaining unit. J.S. Griffith Const. v. United

Bro. of Carpenters, 785 F.2d 706 (9th Cir. 1986). When a representational dispute arises under a Collective Bargaining Agreement, the court may decide the representational dispute if it is a minor component of the breach of contract action. If, however, the breach of contract action is primarily a representational dispute, the court must defer to the NLRB. Amalgamated Cloth. & Text. Wkrs. v. Facetglas, Inc., 845 F.2d 1250 (4th Cir. 1985); Local Union 204, Etc. v. Iowa Elec. Light, Etc., 668 F.2d 413 (8th Cir. 1982). A party cannot avoid a NLRB determination of a representational dispute by characterizing it as an action for breach of contract under a collective bargaining agreement. Local No. 3-193 Intern. Woodworkers v. Ketchikan Pulp, 611 F.2d 1295 (9th Cir. 1980).

The parties to a collective bargaining agreement can agree to arbitrate representational issues. If the parties have agreed to arbitrate these issues, the NLRB will defer to the arbitration award, U.A.W. v. Rockwell International Corp., 619 F.2d 580 (6th Cir. 1989); and the district court can assert jurisdiction to enforce the award. Carey v. Westinghouse Electric Corporation, 84 S.Ct. 401 (1964); Local Union 204, Etc. v. Iowa Elec. Light, Etc., 668 F.2d 413 (8th Cir. 1982). However, the NLRB will not defer to the arbitration award if all concerned parties, including the rival union, did not participate in the arbitration or a party invokes the superior authority of the NLRB. Carey v. Westinghouse Electric Corporation, 84 S.Ct. 401 (1964);

U.A.W. v. Rockwell International Corp., 619 F.2d at 580.

Here the dispute centers on the appropriate unit to represent the paint shop employees. Both Whitehouse and the Teamsters petitioned the NLRB for a determination of this issue. It was only after a hearing before the NLRB that the Painters filed a grievance with the Joint Trade Board. Since the authority of the NLRB has been invoked, its decision takes precedence over the decision of the Joint Trade Board. The NLRB decided that the employees were not covered by the Collective Bargaining Agreement and ordered an election.

The argument that this election was barred by the "contract bar" rule is not persuasive. The "contract bar" rule prohibits employees who have chosen a union representative from changing that

union representative for a certain period of time. It does not prohibit employees who are not currently represented by a union representative to elect one. NLRB v. Mississippi Power & Light Co., 769 F.2d 267, 277 (5th Cir. 1985). Here the paint shop employees were not represented by a union. The "contract bar" rule does not apply.

Accordingly, this action is **DISMISSED WITH PREJUDICE.** An appropriate order will accompany this opinion.

Dated: 1-28-91 EDWARD H. JOHNSTONE, JUDGE
UNITED STATES DISTRICT COURT

ENTERED: January 29, 1991

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IRVIN H. WHITEHOUSE &
SONS COMPANY, INC.
PLAINTIFF,

v.

CIVIL ACTION
No. C90-0143-L(J)

LOCAL UNION 118 OF THE
INTERNATIONAL BROTHERHOOD
OF PAINTERS, etc.,
DEFENDANT,

v.

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION NO. 89, etc.,
INTERVENER.

ORDER

For the reasons stated in the accompanying memorandum opinion, the Motions of the NLRB to intervene and to dismiss are **GRANTED.** This action is **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

DATED: 1-28-91 ENTERED 1/29/91

EDWARD JOHNSTONE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX H

No. 91-5307

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IRVIN H. WHITEHOUSE & SONS COMPANY, INC. Plaintiff-Appellant,	)	
v.	)	ON APPEAL FROM THE UNITED STATES
LOCAL UNION NO. 118 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, Defendant-Appellee,	)	DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
and	)	
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89; NATIONAL LABOR RELATIONS BOARD, Intervening Defendant-Appellees	)	

No. 91-5867

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
v.	)	
IRVIN H. WHITEHOUSE & SONS COMPANY, INC. Respondent.	)	

BEFORE: RYAN and **BOGGS**, Circuit Judges; and **HOOD**, District Judge.*

PER CURIAM. This case involves nine employees of Irvin H. Whitehouse & Sons Company. Whitehouse and the International Brotherhood of Painters contend that the employees in question are part of a bargaining unit represented by the Painters. The Teamsters and the National Labor Relations Board argue that they constitute a separate bargaining unit represented by the Teamsters. Because the NLRB has legitimately used its power to determine appropriate bargaining units, we grant its application and enforce its order against Whitehouse. Because the NLRB has exclusive jurisdiction over disputes of this kind,

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

we also affirm the district court's decision to dismiss a suit brought by Whitehouse involving these same facts.

I

Whitehouse applies commercial and industrial paint and performs related services at various locations throughout the United States. It maintains a central paint shop in Louisville, Kentucky, consisting of three buildings located on a three-acre site, where various equipment is stored, cleaned, and repaired. When Whitehouse employees begin a new job, necessary equipment is transported to the jobsite in a trailer; the trailer then becomes a jobsite shop for storing, cleaning, and repairing equipment. After the job is finished, the trailer is returned to the Louisville facility.

As a member of the Louisville Chapter of the Painting and Decorating Contractors of America, Whitehouse has recognized Local Union 1181 of the International Brotherhood of Painters and Allied Trades, AFL-CIO, as the official bargaining agent of its non-management employees for almost fifty years. A series of collective bargaining agreements between the Contractors and the Painters union has governed this relationship, and requires that disputes arising under the agreements be presented to a Joint Trade Board, composed of representatives from the Painters and the Contractors, for resolution. When the series of agreements began, Whitehouse had only one employee in its Louisville paint shop; as he was too old to enter the apprentice program, he was not represented by the Painters. However,

Whitehouse began hiring additional paint shop employees in the 1970's, and by January 1990 it employed nine shop workers. None of these employees paid union dues, voted for a union representative, or had official ties to the Painters.

The particular agreement between the Contractors and the Painters at issue in this case covered the period between July 23, 1987 and July 22, 1990. It created a new job classification, that of "utility worker," and thereafter Whitehouse began hiring utility workers for its field jobs. However, prior to January 1990, neither Whitehouse nor the Painters recognized the paint shop employees as utility workers, or treated them as being covered by the bargaining agreement. On January 8, 1990, General Drivers, Warehousemen and Helpers Local

Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, filed a representation petition with the National Labor Relations Board seeking to represent the nine paint shop employees. On January 25, Whitehouse responded by filing a unit clarification petition with the NLRB in which it sought to have the shop employees added directly to the Painters as an "accretion." On January 26, the NLRB's Regional Director ordered the cases consolidated and directed a hearing; the Painters intervened in this proceeding.

While the NLRB proceedings were pending, the Painters filed a grievance with the Joint Trade Board, accusing Whitehouse of breaching its agreement by assigning to non-union employees work

that should have been done by the Painters. Specifically, the Painters claimed the paint shop employees as union members. On February 6, 1990, the Joint Trade Board found that the paint shop employees were covered by the "utility worker" classification of the agreement. On February 28, Whitehouse filed an action in federal district court seeking enforcement of the Joint Trade Board's decision under the Federal Arbitration Act. The Painters admitted all allegations in their answer, and the district court entered a judgment confirming the decision on April 9. However, neither the NLRB nor the Teamsters were aware of the district court proceedings. Furthermore, when the judgment was entered, the district court did not know that other parties were interested in the action.

Meanwhile, on January 29, 1990, the NLRB held a hearing in the representation cases. On April 9 -- the same day that the district court entered judgment for Whitehouse -- the Regional Director found that Whitehouse's employees were not covered by the agreement's "utility worker" provision, and that the agreement did not bar an election. He also concluded that the paint shop employees constituted a separate bargaining unit from Whitehouse's other employees, and directed an election to permit the shop employees to vote on whether they wanted to join the Teamsters. Whitehouse sought a review of this decision, but on May 9, the NLRB denied the request for review. On May 22, the Teamsters won a secret ballot election among the paint shop employees; the Regional Director subsequently certified the Teamsters as

the exclusive representative of the shop employees.

On April 27, 1990, the Teamsters filed a motion to intervene in the district court proceeding. The district court granted this motion on May 10 and stayed its April 9 judgment. On June 26, the NLRB filed motions to intervene, set aside the judgment, and dismiss the complaint. On January 29, 1991, the district court concluded that the dispute turned on the appropriate unit for representation, and held that it lacked jurisdiction to determine such an issue. The district court also determined that the NLRB's ruling took precedence over the decision of the Joint Trade Board, and dismissed the action with prejudice. Whitehouse brought this timely appeal.

Shortly thereafter, on July 5, 1990, the Teamsters attempted to bargain with

Whitehouse, but were refused. The Teamsters then filed a charge of unfair labor practice and, on August 17, the NLRB's General Counsel alleged that Whitehouse's refusal to bargain violated the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). Whitehouse responded that the NLRB's certification of the Teamsters was invalid. On October 19, the NLRB issued a decision and order granting the General Counsel's motion for summary judgment. It concluded that Whitehouse had given no good reason for it to reexamine its representation decision. Consequently, it determined that Whitehouse had violated the law by refusing to bargain with the Teamsters, the legally recognized union. The NLRB ordered Whitehouse to cease and desist from refusing to bargain with the Teamsters and from denying its employees

any of their legal rights; it also required Whitehouse to bargain with the Teamsters upon request. The NLRB then applied to this court to enforce its order, under 29 U.S.C. 160(3), and on August 9, 1991, its petition was consolidated with Whitehouse's appeal from the district court.

II

We shall first address the NLRB's application for enforcement of its order. Section 9(b) of the National Labor Relations Act allows the NLRB to determine "the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). To determine whether two groups of employees belong in the same bargaining unit, the NLRB applies a "community of interest test," which includes the following factors:

> (1) similarity in skills, interest, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees.

Armco, Inc. v. NLRB, 832 F.2d 356, 362 (6th Cir. 1987), cert. denied, 486 U.S. 1042 (1988). "The Board's unit determination is conclusive if it is not 'so unreasonable and arbitrary as to exceed the board's power.'" L.M. Berry and Co. v. NLRB, 668 F.2d 249, 251 (6th Cir. 1982)(quoting Meijer, Inc. v. NLRB, 564 F.2d 737, 743 (6th Cir. 1977)). See also South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 805 (1976).

One option for the NLRB in making unit decisions is to clarify an existing

unit by adding employees as an "accretion," meaning that they would be added to the unit directly, without voting in a representation election. Penn Traffic Co. v. NLRB, 546 F.2d 677 (6th Cir. 1976). Because accretion limits employees' ability to choose their own representatives, "'the accretion doctrine should be applied restrictively.'" International Ass'n of Machinists v. NLRB, 759 F.2d 1477, 1480 (9th Cir. 1985) (quoting NLRB v. Sunset House, 415 F.2d 545, 547 (9th Cir. 1969)). Thus, accretions are rarely appropriate. "'A group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it,'" NLRB v. DMR Corp., 795 F.2d 472 (5th Cir. 1986)

(quoting NLRB v. St. Regis Paper Co., 674 F.2d 104, 107-08 (1st Cir. 1982)) (emphasis added by Fifth Circuit). Because it concerns bargaining units, the determination as to accretion is a decision "involving the Board's discretion and should not be set aside unless a reviewing court is convinced that the Board has acted in an arbitrary and capricious manner." NLRB v. R.L. Sweet Lumber Co., 515 F.2d 785, 794 (10th Cir.) cert. denied, 423 U.S. 986 (1975).

The NLRB claims that the following distinctions between the shop employees and the field employees justify its decision to treat shop employees as a separate unit. The nine shop employees work primarily at or from the Louisville shop, while field employees work primarily at customer jobsites. See NLRB v. American Seaway Foods, Inc., 702 F.2d

630, 633 (6th Cir. 1983)(office clericals worked in main office; plant clericals worked in warehouse). The field employees are primarily supervised by project directors at the jobsites, while the shop employees are primarily supervised by Shop Foreman Odell Sexton, who has much greater authority over shop employees than field employees. In contrast to its usual method, Whitehouse hires permanent shop employees without utilizing the Painters' hiring hall. Shop employees are paid from $5.15 to $7.45 per hour, while utility workers receive $4.60 to $4.80. Shop employees receive company-sponsored insurance benefits; field employees derive benefit from Painters' funds. Unlike field employees, shop employees may participate in a company-sponsored employee stock ownership plan. See Automobile Club of

Mich. v. NLRB, 631 F.2d 82, 85 (6th Cir. 1989)("differences in pay scales" justify different units). Shop employees punch time clocks and work from about 6 a.m. to 3 p.m.; field employees keep their time on handwritten cards and work from 7 a.m. to 4 p.m. See Mercy Hosp. of Buffalo v. NLRB, 730 F.2d 75, 81 (2d Cir. 1984). The NLRB also argues that the shop and field employees have little contract with one another. The parties' dispute over these factual issues is quite involved; we cannot explain their claims in full without replicating the briefs. Nonetheless, sufficient differences exist to demonstrate that the NLRB did not abuse its authority by designating the shop employees a separate bargaining unit.

Moreover, neither Whitehouse nor the Painters ever indicated that the shop

employees should be union members until the Teamsters filed their petition.

> Employees may be added by unit clarification where, as in the creation of new job [sic], their existence was unforeseen and they are functionally identical to employee classifications included within the existing unit. Employees cannot be added by unit clarification, however, where they intentionally and historically were excluded from the existing bargaining unit.

NLRB v. Mississippi Power & Light Co., 675 F.2d 267, 279 (5th Cir. 1985) (emphasis in original); see also Wallace-Murray Corp., 192 NLRB 1090 (1971). In this case, the shop employees' work changed gradually over twenty years, and thus, their existence was not unforeseen when the "utility worker" category was established. Neither Whitehouse nor the Painters considered the shop employees to be covered by their contract until the Teamsters appeared on the scene.

Accretion under such circumstances is not appropriate. See also Saints Mary and Elizabeth Hosp. v. NLRB, 808 F.2d 1211, 1212 (6th Cir. 1987).

Whitehouse attempts to avoid the strict guidelines on accretion by claiming that the NLRB has turned a work jurisdiction issue into a representational issue. It maintains that under the terms of its collective bargaining agreement the only issue involved in cases of this type is whether the work performed by the central paint shop falls within the jurisdiction of the Painters. It makes a similar claim in its appeal from the district court. We reject this argument. For this court to consider this case an honest dispute between Whitehouse and the Painters over the status of these nine employees, we would have to ignore almost all of the

relevant facts. For the past twenty years, the shop employees have grown in number and responsibility, yet they were never considered to be union members. Even after the 1987 contract introduced the provision covering utility workers, the shop employees were not treated as union members. Only when the Teamsters attempted to represent the shop employees did the Painters suddenly try to claim them. Thus, the real dispute, and the only dispute, is whether these nine employees will be represented by the Teamsters or the Painters. This is a question of the appropriate bargaining unit, which Congress has refused to leave in the realm of contract interpretation.

Whitehouse also attempts to demonstrate that the nine employees in question meet the five parts of the community of interest test. But this

issue is not for us to decide. We merely determine whether the NLRB has abused its discretion by certifying a particular unit. See NLRB v. Continental Corp. of Mich., 612 F.2d 257, 259 (6th Cir. 1979) ("We do not necessarily believe that the Board acted wisely in approving this bargaining unit. We do believe that it was within the Board's discretion to make the choice it did.").

Finally, Whitehouse asserts that the NLRB's decision is defective in this case because it failed to comply with its own rules. Section 11052.1 of the NLRB's Casehandling Manual for representation proceedings provides that the NLRB will defer to the dispute resolution proceedings of the AFL-CIO whenever two or more AFL-CIO affiliates are involved in a representation battle. Since both the Teamsters and the Painters belong to

the AFL-CIO, Whitehouse complains that the NLRB violated its own procedures. However § 11502.1 applies only when one of the unions in dispute has an "established bargaining relationship" governing the "employees involved." Since the Painters never established such a relationship with the employees in this case, the rule does not apply.

III

Next, we turn to the propriety of the district court's determination that Whitehouse's attempt to enforce the decision of the Joint Trade Board should be dismissed. The district court reasoned that while it has jurisdiction to decide cases involving breaches of collective bargaining agreements, "[i]t does not have jurisdiction to decide the representational status of a bargaining

unit." Because the district court concluded that "the dispute centers on the appropriate unit to represent the paint shop employees," it dismissed the case.

Whitehouse contends that this dispute is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The Act provides for judicial enforcement of arbitration awards whenever both parties have agreed on arbitration and agreed as to the enforcing court. Whitehouse argues that the district court below violated this provision by refusing to enforce the decision of the Joint Trade Board, and also violated a national policy favoring arbitration. See Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

We agree with Whitehouse that arbitration clauses are widely favored in

the law. We also recognize that district courts have a general jurisdiction over contract disputes. However, as stated earlier, representation issues of this kind are within the NLRB's exclusive jurisdiction. In International Bhd. of Boilermakers Local 852 v. Olympic Plating Indus., 870 F.2d 1085, 1089 (6th Cir. 1989), we held that the federal courts should decline to exercise jurisdiction over contract disputes that can be resolved before the NLRB:

> This outcome is particularly appropriate because the instant NLRB proceeding involves a representation issue, i.e., a determination of which union should represent the ... employees. ... That [the union] has characterized the instant claim as a § 301 [of the Labor Management Relations Act] contract claim is of no consequence.

See also Construction Drivers Local 682 v. Bussen Quarries, Inc., 849 F.2d 1123,

1125 (8th Cir. 1988)(representational issue would also resolve contractual issues; court therefore declined to exercise jurisdiction over contractual claim). Parties "cannot avoid a NLRB determination of a representational dispute by characterizing it as an action for breach of contract under a collective bargaining agreement." Local No. 3-193 Int'l Woodworkers v. Ketchikan Pulp Corp., 611 F.2d 1295 (9th Cir. 1980). The NLRB will defer to arbitration of representation issues, but will not do so if a party has invoked its authority, or when less than all the parties to the dispute have agreed to arbitrate. Carey v. Westinghouse Elect. Corp., 375 U.S. 261, 272 (1964); NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 137 (1971). In this case, Whitehouse and the Painters attempted to arbitrate the case

without considering the Teamsters' interests.

Whitehouse also contends that the district court acted improperly in permitting the NLRB to intervene in the action below. We disagree. The NLRB's interest in the case is "direct, substantial, and significantly protectable," United States v. Carrols Dev. Corp., 454 F. Supp. 1215, 1219 (N.D.N.Y. 1978); see also Donaldson v. United States, 400 U.S. 517, 531 (1971). Under the National Labor Relations Act, Congress granted the NLRB the power to hear and determine allegations of unfair labor practices. This gives the NLRB a public interest, unmatched by any other participant in the case. In light of this Congressional action, Whitehouse's argument that only parties to the arbitration can intervene must be

rejected. Obviously, the NLRB does not participate in private arbitration proceedings, yet it clearly has an interest in protecting its jurisdiction. As noted above, the "dispute" in question involved the Painters and Whitehouse, two entities with similar interests, which hid from the district court the entire nature of the dispute.

IV

The NLRB's application for enforcement of its order is **GRANTED**. The district court's decision to dismiss Whitehouse's claim for want of jurisdiction is **AFFIRMED**.

ENTERED AS JUDGMENT 2/5/92,
ISSUED AS MANDATE 2/28/92

APPENDIX I

RELEVANT STATUTES

The following statutes are relevant to this matter:

American Arbitration Act, 9 U.S.C. § 1

Marine transactions and commerce defined; exceptions to operation of title

Maritime transactions, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

* * *

9 U.S.C. § 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670

* * *

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the

award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

July 30, 1947, c. 392, 61 Stat. 672.

* * *

9 U.S.C. § 10

same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procedured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c. 392, 61 Stat. 672.

* * *

9 U.S.C. § 11

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter or form not affecting the merits of the controversy.

The order may modify and correct the award, so as to affect the intent thereof and promote justice between the parties.

July 30, 1947, c. 392, 61 Stat. 673.

* * *

Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as

if it had been rendered in an action in the court in which it is entered.

July 30, 1947, c. 392, 61 Stat. 673.

* * *

National Labor Relations Act (29 U.S.C. §151, et seq.)

29 U.S.C. § 158(a)(1), (3), and (5)

Unfair labor practices

(a) It shall be unfair labor practices for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor

organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement; Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was declined or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

29 U.S.C. § 159

Representatives and elections -- Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representatives, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof; Provided, That the

Board shall not (1) decide that any unit is appropriate for such purposes is such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation; or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(C)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective

bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind

of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month

period, a valid election shall have been held.

July 5, 1935, c. 372, § 9, 49 Stat. 453; June 23, 1947, c. 120, Title I, 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1(c, d), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(d), Title VII, § 702, 73 Stat. 525, 542.